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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 320

MICHIGAN-WISCONSIN PIPE LINE COMPANY,
Appellant,

vs.

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, ET AL.,
Appellees.

No. 321

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Appellant,

vs.

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, ET AL.,
Appellees.

APPEALS FROM THE SUPREME COURT OF OKLAHOMA

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

JACK T. CONN
D. H. CULTON
COLEMAN HAYES
ARTHUR R. SEDER, JR.
Counsel for
Michigan-Wisconsin
Pipe Line Company

CLARENCE H. ROSS
CHARLES C. McDUGALD
WARREN T. SPIES
D. H. CULTON
COLEMAN HAYES
Counsel for
Natural Gas Pipeline
Company of America

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Michigan-Wisconsin Pipe Line Company (Michigan-Wisconsin), appellant in No. 320, and Natural Gas Pipeline Company of America (Natural), appellant in No. 321, file their joint brief in opposition to Motion to Dismiss by appellee Phillips Petroleum Company (Phillips) and Motion to Dismiss or Affirm by appellees The Corporation

Commission of Oklahoma (the Commission) and Certain Mineral (Royalty) Owners filed in Nos. 320, 321 and 322.

1. Appellees do not Defend the Holding of the State Court.

Significantly, neither Motion reflects any effort to defend the basis upon which the Supreme Court of Oklahoma (the State Court) decided the case in favor of appellees. Neither Motion contains even a reference thereto. Obviously appellees recognize that it is indefensible.

As pointed out by these appellants at pages 15-17 of their Statement as to Jurisdiction, the State Court, in an apparent attempt to avoid the impact of the Commerce Clause and the Natural Gas Act upon the sales here involved, construed the gas purchase contract between Phillips and Michigan-Wisconsin and the contract between Panoma and Natural as providing for the sale of the residue constituent of natural gas *in the ground,* before any of the operations of production, gathering or processing occur. This interpretation of the contract is obviously indefensible and is actually inconsistent with the interpretation which this Court itself gave to the same contract between Phillips and Michigan-Wisconsin in *Michigan-Wisconsin Pipe Line Company* v. *Calvert,* 347 U. S. 157 and *Phillips Petroleum Company* v. *Wisconsin,* 347 U. S. 672. The interpretation by the State Court is so far removed from reality that appellees do not even refer to it in their Motions.

The reason for the unrealistic interpretation of the contracts by the State Court was to provide an apparently plausible support for its holding that:

> "The sale is made before anything in the nature of interstate commerce occurs."

and thereby avoid the fundamental constitutional questions involved.

Appellees recognize, notwithstanding this peculiar interpretation of the contracts by the State Court, that the sale by Phillips to Michigan-Wisconsin occurs "at the exhaust of the processing plants" after the raw gas has been produced, gathered and processed.[1]

2. The Controlling Effect of the Opinion in Phillips v. Wisconsin.

This Court, in *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672, made it very clear that Phillips is a natural gas company; that the sale by Phillips to Michigan-Wisconsin here involved is a sale in interstate commerce which, under this Court's holdings in *Public Utilities Commission* v. *Attleboro Steam & Electric Company*, 273 U. S. 83, is one not local in character and one which constitutionally is not subject to state regulation, even in the absence of Federal regulation. This Court, in *Phillips* v. *Wisconsin*, also made it clear that by the enactment of the Natural Gas Act, Congress has provided a Federal Agency to occupy the field of regulating such sales.

Appellees pay scant regard to this recent opinion of this Court, or the reasoning on which that opinion was based. They seek a judgment which would, to a large degree if not entirely, render the holding in that case nugatory. Appellees, the Commission and Certain Royalty Owners, argue primarily that while the Federal regulatory body may provide a ceiling price, the State authorities may provide a

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[1] Appellees concede that in this respect there is no difference between the sale from Phillips to Michigan-Wisconsin and the sale from Panoma to Natural. Therefore, here, as in the Statement as to Jurisdiction, the legal questions involved will be discussed in relation to the Phillips-Michigan-Wisconsin factual situation with which the Court is familiar as a result of its consideration of the record in *Michigan-Wisconsin* v. *Calvert*, supra, and *Phillips Petroleum Company* v. *Wisconsin*, supra.

floor.[2] Phillips argues primarily that, notwithstanding the refusal of this Court to accept a similar argument in *Phillips* v. *Wisconsin*, the State may fix the price at which gas is sold in interstate commerce by refusing to permit the production of gas unless the residue so sold is sold at that price.

Thus appellees would impose limitations and restrictions on this Court's holdings in *Phillips* v. *Wisconsin*. The very statement of these contentions shows that the Federal questions involved are substantial and appropriate for review by this Court. Shall the Federal Power Commission in the exercise of its regulatory duties under the Natural Gas Act be met with the argument that it must apply prices dictated by the producing states? Can its price fixing jurisdiction be thwarted by state price fixing orders? This Court has held that by the Natural Gas Act Congress has occupied the field, *Public Utilities Commission* v. *United Fuel Gas Company*, 317 U. S. 456, 466-467 (1943); that the jurisdiction of the Federal Power Commission is not to vary from state to state depending on the degree of state regulation; and that the jurisdiction of the Federal Power Commission attaches to all wholesale sales of natural gas, whether by a pipeline company or not, and whether occurring before, during or after transmission by an interstate pipeline company, *Phillips* v. *Wisconsin*, supra. Appellees would amend those holdings by adding thereto the words "except as may be otherwise required by the producing states." That would destroy the purposes for which the Natural Gas Act was enacted.

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[2] Appellees do not recognize the anomalous situation that will result under their theory where the floor fixed by the State is above the ceiling fixed by the Federal Power Commission.

3. There Is No Place Under the Commerce Clause for Dual Price Regulation.

The argument of appellees, The Corporation Commission and Certain Mineral Owners, that concurrent regulation of the price of natural gas sold in interstate commerce can exist, the State fixing the minimum price and Federal authorities fixing the maximum, is in conflict with the established rule that when Congress occupies a field, regulations made under its authority are exclusive, leaving nothing in that field for State regulation. *Napier* v. *Atlantic Coast Line R. R. Co.*, 272 U. S. 605, 613 (1926); *Bethlehem Steel Company* v. *N. Y. Labor Rel. Bd.*, 330 U. S. 767, 774 (1947); *Hood* v. *DuMond*, 336 U. S. 525, 541-543 (1949).

Phillips contends that by a clarifying amendment to its Opinion No. 275, *In the Matter of Michigan-Wisconsin Pipe Line Company*, the Federal Power Commission has recognized the Oklahoma price fixing order to be a proper part of Michigan-Wisconsin's cost of service. The amendment on its face does not admit of such a general interpretation. It is not clear that the amendment operates prospectively, and certainly it does not admit that the Federal Power Commission will in the future derogate its own powers to those of the producing states. As interpreted by Phillips the clarifying amendment cannot be reconciled with the opinion of the Court of Appeals in *Northern Natural Gas Company* v. *Federal Power Commission*, 206 F.2d 690; cert. den. 346 U. S. 922, or the opinion of this Court in *Phillips Petroleum Company* v. *State of Wisconsin*, 347 U. S. 672. This situation clearly demonstrates that in this action substantial Federal questions are presented which require the review of this Court.

Unless jurisdiction of these causes is taken and the issues decided on the merits, appellants may find themselves in a

position where they will be required under the five to four decision of the Supreme Court of Oklahoma to pay the minimum state price to the producer and yet not have such price recognized as a cost by the Federal Power Commission. In the case of Natural the excess of the minimum price over the contract price amounts to over $1,000,000 per annum.

4. The Order Is a Regulation of Sales, Not Production.

The primary argument of Phillips that the State's price fixing order is valid as a production order is in conflict with the holdings of this Court in *Phillips* v. *Wisconsin,* supra. Phillips concedes that the sale is made at the outlet of a gasoline plant after all activities of producing, gathering and processing have been completed. In *Phillips* v. *Wisconsin,* Phillips did not argue that such sales were a part of production; the argument there was that the sales were a part of gathering. This contention was rejected. This Court stated that the finding of the Federal Power Commission to that effect was without basis in law; that production and gathering ended before the sales were made. Obviously if they are not a part of gathering such sales are not a part of production, the initial activity.

Phillips now argues that the order does not directly fix the price of residue gas at the outlet of a gasoline plant, but merely imposes a condition on production, namely, that gas shall not be produced unless the residue is sold at the price fixed. Thus, it is conceded that at least the order constitutes an embargo against production to enforce the price fixed by the State.

Even interpreting the order as a production order, the sanction against production is invalid. When the gas is

produced, gathered and processed, the residue constituent is a lawful article of commerce. Its sale in interstate commerce cannot be prohibited, regulated or encumbered by the states.[3] *The fact that the production is conditioned upon compliance with an attempted effort to fix the price of gas sold in interstate commerce makes it void under the Commerce Clause. Foster-Fountain Packing Company* v. *Haydel,* 278 U. S. 1 (1928); *Toomer* v. *Witsell,* 334 U. S. 385 (1947).

In support of its theory, Phillips argues, in effect, that it is necessary that the State have power to require that the producers who sell their residue gas at the outlets of gasoline plants obtain the price fixed by the order, so that all producers will have the same economic profit from their operations when related to the wellhead—that there must be "uniformity." But this Court many times has stated that *no* state interest justifies state regulation of interstate commerce.

Moreover, the theory has been expressly rejected by the Court of Appeals for the Eighth Circuit in *Northern Natural Gas Company* v. *Federal Power Commission,* 266 F.2d 690.[4] In that case the Court recognized that state regulation of price in the producing areas was equivalent to fixing the price to the ultimate consumers in the consuming states, which was beyond the power of the state. In the instant cases Panoma and Phillips are natural gas companies, just as is Northern Natural. For the same reasons stated in the Northern Natural case, the state may not fix the prices charged by Panoma and Phillips.

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[3] *West* v. *Kansas Natural Gas Company,* 221 U. S. 229 (1911); *Pennsylvania* v. *West Virginia,* 262 U. S. 553 (1923); *Hood* v. *DuMond,* 336 U. S. 525, 535 (1949).

[4] Certiorari denied by this Court and Motion for Rehearing denied on the day the opinion in *Phillips* v. *Wisconsin* was delivered.

5. The Constitutional Questions Were Presented to and Considered by the State Court.

Phillips argues that appellants did not make the contention before the State Court that the State Commission's order is incompatible with the jurisdiction of the Federal Power Commission under the Natural Gas Act. This contention is difficult to understand, in view of the fact that this question was expressly presented to the State Court in oral argument and in briefs filed by appellants in the State Court, and four members of the Court cited the conflict in their dissenting opinion. Moreover, counsel for Phillips orally and in briefs discussed the issue. In one of its briefs filed in the State Court, Phillips, referring to appellants' argument as to the importance of the Court of Appeals' opinion in *Wisconsin* v. *Federal Power Commission,* 205 F. 2d 706, said:

> "The decision in *Wisconsin* v. *Federal Power Commission* has no bearing on these cases.
>
> "The basis of plaintiffs in error's argument is that the Circuit Court in the *Wisconsin* case held that the Federal Power Commission has jurisdiction under the Natural Gas Act, 15 U.S.C. secs. 717 et seq., to regulate sales by Phillips of residue from the gas here involved and that the order of the Corporation Commission is an attempt to regulate the same sales and for that reason invalid."

Throughout the entire proceedings appellants have continuously stressed the invalidity of the Commission's price fixing order when tested by the Commerce Clause. Until the decision of the Court of Appeals of the District of Columbia, it was uncertain whether, although the sales were recognized to be a part of interstate commerce, jurisdiction

thereof was withheld from the Federal Power Commission by the exclusion of production and gathering. It was appellants' contention that the order is violative of the Commerce Clause, regardless of whether jurisdiction over such sales was withheld from the Power Commission. Beyond question the matter was presented to and argued before the State Court, and considered by that Court.

Appellants respectfully submit that the Motions to Dismiss should be denied and the cases heard on briefs and oral argument.

Respectfully submitted,

JACK T. CONN
D. H. CULTON
COLEMAN HAYES
ARTHUR R. SEDER, JR.

Counsel for MICHIGAN-WISCONSIN PIPE LINE COMPANY

CLARENCE H. ROSS
CHARLES C. McDUGALD
WARREN T. SPIES
D. H. CULTON
COLEMAN HAYES

Counsel for NATURAL GAS PIPE LINE COMPANY OF AMERICA